

Atty Gen. Op. No. 11 - IB06

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June 22, 2011

Mr. Michael Lang
101 Garrett Road
Claymont, DE 19703

**RE: Freedom of Information Act Complaint
Against Brandywine School District**

Dear Mr. Lang:

On April 13, 2011, the Delaware Department of Justice ("DDOJ") received your complaint that the Brandywine School District ("the District") violated the Freedom of Information Act ("FOIA") by denying you access to records related to two lawsuits filed against the District. The DDOJ forwarded your letter to the District and, after granting an extension of time for the District to respond, received its timely response. This is the DDOJ's determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

By letter of March 3, 2011, you requested the District to provide the following:

- The complete settlement negotiated between the district and the plaintiffs in the case reported in the News Journal on Jan. 8, 2011. That includes any financial compensation along with all other terms of this settlement
- The name of the district's outside attorney(s) and the amount of money paid for their services.
- The source of the money for the settlement and attorneys' fees.
- The same information with respect to a lawsuit settled in August....

One of the suits was filed in the Superior Court for the State of Delaware, and the other in the United States District Court for the District of Delaware.

The District responded by letter of March 9, 2011 that it intended to provide you with access to all public documents responsive to your request. Although in that response, the District took the position that documents from its insurer as to the status of settlement payments are not public records, it now recognizes that a public body's records of amounts paid by its insurer in settlement of a claim are public records. It asserts, however, that the settlement agreements in both lawsuits were filed under seal with court approval, and the District attached to its response copies of court records indicating the settlement documents are sealed—not available to the public—by orders of the respective courts. Because the District has met its burden of proving the settlement documents are under seal, the issue for us to determine is only whether court documents filed under seal are public records under FOIA.

RELEVANT STATUTES

"All public records shall be open to inspection and copying by any citizen of the State during regular business hours" ¹ 29 *Del. C.* § 10003(a). However, "records specifically exempted from public disclosure by statute" are not public records. 29 *Del. C.* § 10002(g)(6).

DISCUSSION

All records of a court proceeding in the Delaware Superior Court are public unless they are filed under seal upon a motion showing good cause. Super. Ct. Civ. R. 5(g). The rules of the Superior Court in civil actions "supersede all statutory provisions

¹ While FOIA refers throughout to "citizens," restricting the rights created by FOIA to only citizens of Delaware has been held to be unconstitutional. *Lee v. Minner*, 458 F.3d 194 (2006).

in conflict or inconsistent therewith." 10 *Del. C.* § 561(c). Therefore, in the Superior Court case, the documents placed under seal by court order are not public records.

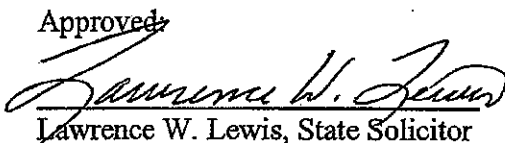
The settlement agreement in the District Court case was filed in a court-approved public version that redacts the amount of the settlement. Order, *Thomas v. Bd. of Brandywine Sch. Dist.*, No. 08-cv-205 (D. Del. Jan. 26, 2011). As the United States Supreme Court has stated, "[t]here is nothing . . . to suggest that in adopting the [federal] Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents." *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 387 (1980). For the DDOJ to require the District to produce an un-redacted form of the District Court settlement agreement would be to require it to commit contempt of court. There is no reason for the DDOJ to do what the United States Supreme Court has declined to do in similar circumstances.

CONCLUSION

For the reasons stated herein, the Brandywine School District did not violate the Freedom of Information Act, because the records it refused to make available are protected from public access by court order.

Sincerely,

Judy Oken Hodas
Deputy Attorney General

Approved:

Lawrence W. Lewis, State Solicitor

cc: Ellen Marie Cooper, Esq., Director of Legal Affairs